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David George, individually, and as personal representative of the heirs of Betty George, deceased v. LDS Hospital, Kimball Llyod, M.D., and Michael Lahey, M.D., : Reply Brief

Utah Court of Appeals

Elliot J. Williams; Larry r. Laycock; Snow, Christensen & Martineau; J. Anthony Eyre; Michael F. Skolnick; Kipp .
Steve Russell; Kathryn Collard; Attorneys for Plaintiff-Appellant.

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

DAVID GEORGE, individually, and as personal representative of the heirs of BETTY GEORGE, deceased,

Plaintiff-Appellant,

v.

LDS HOSPITAL, KIMBALL LLOYD, M.D., and MICHAEL LAHEY, M.D.,

Defendants-Respondents.

Docket No. 890381-CA

Argument Priority 14b

REPLY BRIEF OF THE APPELLANT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County, State of Utah
The Honorable Pat B. Brian, District Judge, Presiding.

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APPELLANT'S REPLY BRIEF

Appellant, by and through counsel, submits the following Reply to Respondent LDS Hospital's Brief on Appeal in the above-entitled case. References to LDS Hospital's brief will be designated LDS Brief, p. ___; references to the Record On Appeal will be R-___; references to the Trial Transcript [R-763-68] will be Tr. ___; and references to the Supplemental Record On Appeal consisting of further Trial Transcript [R-769-771] will be designated by record and page number.

Respondent Michael Lahey, M.D., has also filed a Brief in this appeal. However, no response from Appellant to that brief is necessary, since Appellant agrees completely with Dr. Lahey's position on the facts and law. The Trial Court clearly erred in failing to grant Appellant's Motion for a Directed Verdict in favor of Dr. Lahey [Lahey Brief, pp. 4, 6] and Dr. Lloyd.

SUMMARY OF APPELLANT'S REPLY

Since Appellant was deprived of an adequate opportunity to object at trial, this Court should review Appellant's claims of error in the Jury Instructions and Special Verdict in the interests of justice pursuant to U.R.Civ.P. 51.

Respondent LDS Hospital has failed to provide any persuasive argument or authority to excuse the trial court's refusal to instruct the jury as to Appellant's theory of the case or to justify the legally erroneous instructions given to the jury. Likewise, Respondent has offered no legitimate justification for the fact that the Special Verdict form effectively precluded any opportunity for the jury to award Appellant damages for the injuries suffered by

Betty George prior to her death. Appellant's case on this issue was conclusively proven. Respondent produced no evidence to the contrary. The Jury Instructions, taken as a whole, do not cure these fatally prejudicial errors, which were compounded by the trial court's refusal to grant Appellant a New Trial.

APPELLANT'S REPLY TO RESPONDENT'S ARGUMENT

I. THIS COURT SHOULD REVIEW APPELLANT'S CLAIMS OF ERROR IN THE JURY INSTRUCTIONS AND SPECIAL VERDICT FORM UNDER RULE 51, U.R.Civ.P.

Respondent, though knowing better, claims that Appellant did not object: 1) to the the trial court's failure to give Appellant's Proposed Jury Instructions 24 and 32 [LDS Brief, pp. 8-9]; 2) to the trial court's inclusion of Instructions 16a and 21a [*Id.*, p. 13]; and 3) to claimed errors on the Special Verdict. [*Id.*, p. 20] Appellant's objections to Instruction 21a, are clearly and fully set forth in the record. [Tr. 889-91; 894-97; 906-08.]

Generally speaking, a party must make timely and specific objections to instructions and verdict forms to have claims of error preserved for appeal. However, in addition to what Respondent found relevant [LDS Brief, p. 9], U.R.Civ.P. 51 also provides:

> Notwithstanding the foregoing requirement, the appellate court, in its discretion *and in the interests of justice*, may review the giving of or failure to give an instruction. (emphasis added)

The primary purpose of the rule requiring specific objections to proposed instructions, is to allow the trial court to correct any errors ***before*** submission to the jury for their deliberation. Hill v. Cloward, 14 Utah 2d 55, 377 P.2d 186 (1962). *See also*, Hansen V. Stewart, 761 P.2d 14, 16 (Utah 1988); Cambelt International Corp. v.

Dalton, 745 P.2d 1239, 1241 (Utah 1987); and Beehive Medical Electronics, Inc. v. Square D Co., 669 P.2d 859, 861 (Utah 1983).

In this case, Appellant had absolutely no opportunity to object to the final Instructions before they were read to the jury. Note that Appellant's extensive recitation of the facts and circumstances surrounding the Jury Instructions is not challenged or rebutted by Respondent in any way. *See,* PLAINTIFF'S MOTION FOR J.N.O.V., OR FOR A NEW TRIAL and MEMO IN SUPPORT OF MOTION [R-443-478; 596-630]; the AFFIDAVIT OF COUNSEL FOR THE PLAINTIFF [R-479-493; 638-652]; PLAINTIFF'S RESPONSE TO DEFENDANT'S MEMO IN OPPOSITION TO MOTION FOR A NEW TRIAL [R-654-670]; and the Transcripts of the Argument on PLAINTIFF'S MOTION FOR A NEW TRIAL, dated January 17, and January 27, 1989. [R-769, pp. 2-16; R-770, pp. 19-33]

It is also clear from the trial transcript that Appellant was afforded no opportunity to object. Both sides rested at 12:30 p.m. on the last day of trial. [Tr. 786-87] Thereafter, the trial court heard and denied the parties' various Motions for Directed Verdict. [Tr. 786-800] At this time, 15 minutes before closing arguments, counsel had yet to even see the final Jury Instructions or Special Verdict. Counsel rightfully believed the final set of Instructions had been determined the day before at a conference with the Court for that specific purpose. [November 8, 1989, was Election Day, and the Court reporter was not present.] After a short recess [Tr. 801], during which time the reporter was apparently dispatched, a set of final Instructions was produced. Respondent's counsel, over Appellant's strenuous and specific objections, convinced the Court to add Instruction 21a minutes before the jury was instructed. With

attention riveted solely to that complete transformation of Appellant's case, there was no opportunity to notice that Appellant's proposed Instructions 24 and 32 had been deleted.[fn1] Respondent's Instruction 16a was inserted without discussion sometime after the conference on November 8th. The Special Verdict was not, at that point, typed or finalized and could not be discussed. Immediately thereafter, the jury was instructed, Appellant's counsel having been afforded no opportunity to object on the record. [Tr. 801]

The Special Verdict was discussed after the jury was instructed. [Tr. 801-802] However, the final Special Verdict was still not available, and Appellant's counsel, based on prior discussions, believed that the jury would be allowed to evaluate liability for pre-death damages to the Estate separately, as Utah law requires. The Special Verdict was delivered to counsel simultaneously with the beginning of Appellant's closing argument. There was no opportunity to review it, much less object. Appellant's counsel was not aware that the Special Verdict effectively eliminated half of Appellant's case until 3/4 of the way through closing argument, at which point counsel approached the Bench and objected to the Special Verdict Form. [Tr. 849-51] [fn2]

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fn1 After the jury retired, the trial court made itself unavailable to hear objections. [Tr.888-89] In all honesty, counsel did not realize Instructions 24 and 32 had been eliminated until some days after the trial ended. Because of the last-second inclusion of Instructions 16a and 21a, it was necessary for Appellant's counsel to work on a complete revision of their closing argument as the Court instructed the jury. Their absence from the Instructions effectively made the error invisible.

fn2 In that off-the-record discussion, the trial court refused to simply add the phrase "or the Estate of Betty George" to the end of question 3B, but did agree to add a separate line for pre-death damages to the Estate - a line that could not be reached if the jury answered "no" to question 3B.

The events of the last day of trial make a mockery of the purpose and intent of Rule 51. In addition, U.R.Civ.P. 46, directly applies to this case. Rule 46 provides:

> Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Rule 46 has been applied to objections regarding Jury Instructions. *See*, Hanks v. Christensen, 11 Utah 2d 8, 354 P.2d 564 (1960); and Valentine v. Faulkner, 473 P.2d 482 (Ariz. App. 1970). Appellant subsequently made specific objections in the form of an immediate Motion for a New Trial. Therein, Appellant's objections were fully detailed to the trial court long before the entry of Final Judgment on March 14, 1989. [R-709-12] *See*, Barson v. E.R. Squibb & Sons, 682 P.2d 832, 837 (1984). Under these circumstances, justice and fairness demand that this Court carefully review the Jury Instructions given and not given, as well as the Special Verdict, which Appellant claims constituted error.

II. THE TRIAL COURT ERRED IN FAILING TO GIVE APPELLANT'S PROPOSED INSTRUCTIONS 24 AND 32.

Respondent agrees that Appellant was entitled to have the jury instructed on his theory of the case [LDS Brief, p. 8], but argues that Appellant's Proposed Jury Instructions on causation do not correctly state Utah law. [LDS Brief, pp. 9-13]

Appellant's principal theory for recovery was that the negligence of LDS Hospital completely deprived Betty George of

necessary medical diagnosis and treatment, and was thereby a contributing proximate cause of her arrest and death. The factual testimony on this theory was unanimous in Appellant's favor, and was further supported by Appellant's competent expert testimony regarding proximate cause. Appellant proposed proper instructions setting forth that theory. [Plaintiff's Proposed Instructions 24 and 32; R-251, 261.]

Appellant has cited numerous cases from other jurisdictions supporting the "increased risk" - "reduced chance of survival" theory for recovery. Respondent's complaint that Appellant cited no Utah authority to support the proposed Instructions [LDS Brief, p. 9] is without merit, since the Utah Courts have yet to rule on the issue. Newsome v. Gold Cross Service, Inc., 116 U.A.R. 34, 35, ___ P.2d ___ (Ut. App. 1989). The Utah cases relied on by Respondent simply do not consider the issue of whether a jury should be allowed to determine if a hospital's total failure to procure necessary medical diagnosis and treatment can be a contributing proximate cause of a subsequent complication.

Moreover, this is not a case where Appellant offered evidence of only a speculative possibility on causation. Both of Appellant's experts expressly stated that the Hospital's negligence proximately caused the patient's arrest by eliminating her chance for diagnosis and treatment. The trial court, having allowed the testimony, was fully aware of it [Tr. 187-91, 213-15, 311, 315-17, 319-20] and made specific rulings that Appellant had provided sufficient evidence on causation to go to the jury. Twice, first when Appellant rested,[fn3]

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fn3 At this point, one of respondent's physician experts, Dr. Trowbridge, had been called out of order and testified. [Tr.518-47]

and later after all the evidence was in, Respondent moved for a Directed Verdict on the issue of causation. Both times the Motions were denied. [Tr. 561-565; 800-01] After the close of Appellant's evidence, the trial court ruled:

> The Court listened with some care and attention to all the testimony regarding cause of death. That issue was raised on at least two occasions by counsel for both sides. The Court is persuaded that, although the weight of the evidence may be a question for the trier of fact, *there is competent evidence to determine cause of death. Id.*, at 564-65

Further, as fully detailed in the addenda to Appellant's initial brief,[fn4] every nurse *and physician* who testified stated that the nurses had a duty to contact a physician about their observations on the afternoon of August 2nd, and every physician testified that the patient's symptoms required immediate intervention, which would have been provided had they been made aware of the patient's condition. Those facts in evidence, the court erred in not allowing the jury to perform its function and determine whether the Hospital's negligence was a substantial factor in causing the injuries and damages complained of.

The facts in Thomas v. Corso, 265 Md. 84, 288 A.2d 379 (Md.App. 1972), closely resemble those in the case at bar. There, Corso was injured when struck by a vehicle. He was admitted to a hospital,

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[fn4] Respondent's "presumption" about the Addenda to Appellant's opening brief is wrong. [LDS Brief, p.7, fn.2] Rather than file last-second *ex parte* Motions to this Court, Appellant requested permission to file an overlength brief three weeks before his brief was due. The Motion was denied without explanation. Thereafter, pursuant to this Court's express invitation, Apellant presented his brief to the Clerk's Office *prior to filing* and were given assurance by the Clerk that the form and content of the Brief and Addenda were appropriate. Consequently, *if* respondent made a Motion to Strike the Addendum [no such Motion has been provided to Apellant, and does **not** appear in the record], it is without merit and should be denied.

and nurses contacted the on-call physician, provided information and received instructions.[fn5] There were disputes as to the nature and extent of the information given. Later complications went unreported, and the patient died of traumatic shock without ever having been diagnosed or treated by a physician.

One of the physician's defenses was that death was inevitable due to the nature (learned after-the-fact) of Corso's injuries. When confronted with the ultimate question, the defendant doctor declined to say that he could have saved Corso's life if notified by the nurses, stating; "Only God knows the answer to that question." He stated only that he *might* have. *Id.*, at 386 The Court held:

> Dr. Thomas' admission that he believed he might have helped Corso, might have revived Corso if he had been called at 12:05 a.m., and that lack of treatment by a physician increased Corso's danger of losing his life, together with Dr. Furie's testimony that Corso's chance for survival was linked to treatment, and that shock must be promptly and effectively treated or it will become irreversible, are sufficient to justify a jury finding of a substantial possibility of survival which was destroyed by the failure of Dr. Thomas to examine, diagnose and treat Corso at any time after Corso arrived at the Emergency Room . . .
>
> From what we have already stated, *the jury could have reasonably concluded* under the circumstances of this case that if Dr. Thomas had performed his duty to attend Corso personally shortly after he was telephoned at 11:30 p.m., Dr. Thomas might well have been able to have saved his life and that this negligent conduct was *one of the direct and proximate causes* of Corso's death, *concurrent with the negligence of the nurses.* *Id.*, at 390 (emphasis added)

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fn5 Here, the evidence is uncontradicted that the information given Dr. Lloyd was false or incomplete, and that no physician anywhere was apprised of critical hospital staff observations that required immediate attention. [Tr. 385-410, 635-36, 613-15, 619-30, 697, 703, 711-12, 724-28]

No testimony on the medical cause of death was required. The relevant question to the jury there, as it should have been here, was: Did the failure of the hospital to procure necessary medical care, contribute to the cause of death? Obviously the primary cause of Corso's death was the unfortunate fact that he was run over by a car. He went to the hospital, the hospital had a duty to make sure he got necessary medical treatment, it failed to do so, and Corso died. The causation issue thus presented is not complex, technical or necessarily medical. The Corso Court had no struggle with the issue of proximate cause on the part of the hospital:

> The testimony in regard to Corso's vital signs at 12:05 a.m. and of Dr. Thomas and Dr. Furie is sufficient to enable a jury to find a causal connection between the acts of the nurses and Corso's death. *Id.*, at 392

Of course, as the undisputed facts demonstrate, the negligence of the hospital in this case was far worse since it completely deprived Betty George of the opportunity for diagnosis and treatment.[fn6]

Under these circumstances, Appellant was absolutely entitled to have the jury instructed on his theory of the case. The trial court's failure to do so was reversible error.

[fn6] The following references to the testimony set forth in ADDENDUM I to Appellant's Opening Brief contain some of the evidence from which the jury could have found that the negligence of LDS Hospital proximately caused the arrest and brain death of Betty George on August 2, 1986, but which was precluded by Instruction 21a requiring Appellant to prove the cause of death through physician testimony. *See*, ADDENDUM I, pp.5-14, 16-27, 31-32 35-37, 39-49, 54-64, 66-70, 72-78, 81-84. *See also*, the SUPPLEMENTAL ADDENDUM attached hereto containing references from the Partial Transcript [R-771], added to the record by Respondent LDS Hospital.

III. THE JURY INSTRUCTIONS DID NOT CORRECTLY STATE THE LAW APPLICABLE TO APPELLANT'S CASE AGAINST LDS HOSPITAL, AND TENDED TO CONFUSE AND MISLEAD THE JURY.

Appellant's claims at trial were in no way related to the conduct of any physician. Nor were they about diagnosis or treatment by a physician. Appellant's case was against LDS Hospital, and concerned solely with the conduct, or in this case, the inaction of the Hospital staff. The sole issue was whether the failure of the Hospital staff to procure necessary care by a physician was a contributing proximate cause of the patient's subsequent complication. As the trial court correctly held numerous times during the trial, the underlying medical cause of death was irrelevant. [*See*, Addendum II to Appellant's Opening Brief.]

Respondent nevertheless argues that Instructions 16a and 21a, requiring that Appellant had to prove the *medical cause of death*, and that the *only* competent expert testimony on causation under these circumstances must come from a physician, are correct statements of the law. [LDS Brief, pp. 15-18] Respondent is wrong.

Not a single case cited by Respondent actually stands for the proposition for which it is advanced: That in a case solely against a hospital, based solely on the conduct of the hospital staff - expert testimony from a physician is required to establish causation. All of the cases cited by Respondent involved *physician* defendants, except Hoopiiaina v. IHC, 740 P.2d 270 (Ut. App. 1987) and Schmidt v. IHC, 635 P.2d 99 (Utah 1981).

Schmidt is very important for what it does **not** say. The case involved catheterization, a procedure presumably outside the common knowledge of laymen. Both sides called physicians to testify as

experts on the subject. The Utah Supreme Court, in this, its first decision solely involving a hospital defendant that Appellant is aware of, said this:

> In order to recover for the negligence of a medical practitioner, a plaintiff must prove that 1) there was negligence and 2) the negligence was a proximate cause of plaintiff's injury.

That is exactly the law set forth in Appellant's Proposed Instruction 16 [R-510], which Appellant claims was a correct statement of the law, but which was confused and overshadowed by Respondent's Instruction 16a and 21a. The Schmidt Court did not require plaintiff to prove the underlying medical cause of a complication, nor did it require physician testimony.

In Hoopiiaina, the plaintiff claimed that a drug, mistakenly administered by a nurse, caused injuries. Plaintiff produced *no expert testimony at all*, despite numerous admonitions to do so. In upholding summary judgment in favor of the hospital, this court affirmed the requirement of *expert testimony*, not testimony from a physician. Hoopiiaina is further distinguishable since it involves the relatively complex question of whether a specific drug could cause a specific result.

Appellant again asserts his position that the trial court should have submitted the causation issue in this case to the jury without the requirement for any expert testimony. *See*, Thomas v. Corso, *supra*. Expert testimony, such as supplied by Appellant, is necessary to establish the standard of care for health care providers, as well as the breach of the standard of care. Since Appellant presented such evidence, the jury should have been allowed to determine the *factual question* of whether the Hospital's

negligence was a contributing proximate cause of Betty George's arrest. That is exactly what the trial court ruled when it denied Respondent's second Motion for a Directed Verdict on the causation issue:

> The Court finds that there has been an abundance of testimony regarding standard of care, [and] alleged breach of that standard, *which creates the* ***factual*** *issue* [on causation] *for the trier of fact.* And the Motion for Directed Verdict by the defendant is denied. [Tr. 800-01] (emphasis added)

Immediately after that ruling, the trial court added Instructions 16a and 21a, which were completely at odds with the court's consistent rulings throughout the trial, contrary to law and prejudicially unfair to Appellant. It is impossible to reconcile the fact that the trial court ruled there was a factual question to go to the jury on causation, and then five minutes later instructed the jury not to consider the facts and evidence introduced by Appellant's qualified experts which had previously been admitted.

The Utah Supreme Court has held that it is reversible error for a court to take from a jury a factual issue on which there is disputed evidence. In Harris v. Utah Transit Authority, 671 P.2d 217, 220 (Utah 1983), the Supreme Court reversed a jury verdict in favor of defendants after finding that an erroneous instruction on proximate cause had the effect of directing a verdict on that issue. The Court held:

> In the present case the disputed instruction was erroneous because it failed to submit the proximate cause issue to the jury for determination . . .
>
> Where the evidence is in dispute, including the inferences from the evidence, the issue should be submitted to the jury . . .

> [T]he right to trial by jury is a basic principle of our system that cannot be allowed to be eroded by improper intrusions on the jury's prerogative. (citations omitted)

No attempt was made by Respondent to distinguish or otherwise counter Appellant's relevant and persuasive authorities from other jurisdictions, where courts have ruled that there was no need for expert testimony in cases factually similar to this one. Nor was any rationale offered as to why the jury should have been precluded from considering the testimony of Appellant's qualified hospital experts on the result of negligent conduct exclusively within a hospital staff's duty and obligation.

Crowe v. Provost, 374 S.W.2d 645 (Tenn.App. 1963), is a perfect example of Appellant's theory correctly applied. There, plaintiffs claimed that the nurse involved failed to attend to a sick child, and to correctly report his condition to the physician. At trial, both defendants testified that the child's death was sudden and unexpected due to an overwhelming infection. In addition, the defendants called *six* local physicians, all of whom testified that the child died from an overwhelming infection, and there was nothing either the doctor or nurse could have done to prevent it had they been present. *Id.*, at 650

Plaintiff's theory on causation was that the child aspirated vomit. In support of their theory, plaintiffs called *one registered nurse*. She testified that the child's symptoms required the nurse to notify a doctor, to stay with the patient until the doctor's arrival, and to provide whatever assistance she was capable of. Plaintiffs' nurse expert also testified that it was *possible* for a person to choke to death on their own vomit.

The defendants appealed from an adverse jury verdict. The only question on appeal was whether the negligence of the nurse *contributed* as a proximate cause of the death of the child. *Id.*, at 648 The court, in language directly applicable here, held:

> We think jurors of ordinary intelligence and judgment, although not skilled in medical science, are capable of reaching a conclusion without the aid of expert testimony, from these proved facts and circumstances, whether
>
> injurious consequences or death would probably result to a patient without proper medical or nursing attention. . . [fn7]

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fn7 Compare the foregoing to the testimony of Dr. Lahey, the last physician to evaluate Betty George prior to her arrest. [Tr.621-23]

Q: Do you see the nurse's note at 2:20 in the afternoon, right after Mrs. George got back [from the ICU], describing her as very distant and incoherent at times?

A: Yes, I do.

Q: That's the kind of change which, if made known to you, you would take action on, wouldn't you?

A: Yes.

Q: You would want to know what was causing that potentially dangerous change in condition, wouldn't you?

A: Yes.

Q: If, Dr. Lahey, you had been aware of this change in Mrs. George's condition that you have just discussed . . . you would have had four and a half hours prior to the time she arrested to investigate the reason for that change, wouldn't you?

A: Yes.

Q: The last time you saw Mrs. George, the thought did not occur to you that she might be brain dead five hours later, did it?

A: Didn't occur to me in the least.

Q: If you had suspected that she had a respiratory condition or an infectious condition that might result in that, you should have never let her out of ICU, should you have?

A: I shouldn't be practicing medicine right now.

Q: When you last saw Mrs George in the ICU, you weren't thinking that [her condition] was going to get worse, did you?

A: No, I had no reason to believe that it was going to get worse.

> Opinions of medical experts as to the cause of death, . . . do not invade the province of the jury, but go to them to be weighted along with the other evidence in passing on the question of causation; or, stating the rule more broadly, when expert opinion as to causation is admissible, the weight of the opinion should be determined by the jury . .
>
> Where negligence and injury are proved, a causal connection between them may be established by circumstantial evidence, by inferences from physical facts . . .
>
> Accordingly, we are of the opinion the medical proof in the record that some condition for which the defendants would not be liable because not due to any act of negligence on their part might have caused the death of the child, does not destroy or overcome as a matter of law the probative force of the evidence that the more probable cause was the negligence of the defendant nurse in abandoning an ill and unconscious child. *Id.*, at 650-51

In this case, one of Appellant's theories was that Betty George's initial arrest and brain death were the result of lack of oxygen. The causal link between the Hospital's negligence and the

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[Tr. 629-30] Q: You have been practicing for how long, Dr. Lahey?

A: I finished my residency in 1981. Eight years . . .

Q: During that period of time, you have had patients who have been infected or septic before, haven't you?

A: *Yes, many.*

Q: You have had patients who have been in much worse condition than Mrs. George was in the last time you saw her, haven't you?

A: Many.

Q: And they didn't all die, did they?

A: God forbid. No, they did not.

Q: *The vast majority of them didn't, did they?*

A: *Exactly.*

Q: There is not one of those patients that you ever gave up on, is there?

A: That's right.

result was expressed by Appellant's experts, supported by the treating physicians, and inferred by defendants' experts. [*See*, Footnote 6, Addendum I to Appellant's Opening Brief, and the Supplemental Addendum attached hereto.] Indeed, there was competent testimony from Appellant's expert respiratory therapist that the 10 minute delay in initiating resuscitation during the Code procedure was enough *alone* to have caused her brain death. [Tr. 317-22] The trial court previously qualified Mr. Owings as an expert, and specifically ruled that his opinions should be considered by the jury in reaching a verdict. [Tr. 301-02] Jury Instructions 16a and 21a told the jury not to consider Mr. Owing's expert opinion on causation, and thereby completely eliminated yet another opportunity to find in Appellant's favor.

Given negligence and injury, the jury should have been allowed to make their own factual determination on causation from the circumstances and inferences to be drawn from the facts. Northern Trust Co. v. Louis A. Weiss Memorial Hospital, 493 N.E.2d 6, 11-12 (Ill. App. 1986), Restatment (Second) of Torts, §323 comment a (1965). Jury Instructions 16a and 21a precluded the jury from considering the testimony of Appellant's experts, prohibited them from making a factual determination as to causation from the totality of the evidence, and required the jury to direct their deliberations to the irrelevant medical cause of death, which was an event totally distinct from the initial arrest upon which Appellant's claims were based.[fn8]

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fn8 Dr. Lahey testified that Betty George's death was inevitable after the initial arrest on August 2nd. [Tr. 629]

Respondent appears to take the illogical position that testimony from qualified hospital experts could never be considered by a jury in determining causation, However, in Farrow v. Health Services Corp., 604 P.2d 474, 477-78 (1979) [LDS Brief, p. 16], our Supreme Court reversed summary judgment in favor of LDS Hospital and a physician, based, in part, on the testimony of a nurse expert. The Court specifically found that the nurse's testimony raised issues of fact which had to be determined by the jury.

Clearly, the history of medical malpractice law in this state, as well as the requirement for expert testimony, emanates from actions against *physicians and surgeons,* not hospitals. For example, in Frederickson v. Maw, 119 Utah 385, 227 P.2d 772, 773 (1951), [LDS Brief, pp. 16-17], the Court's holding is quite specific:

> The better-reasoned cases announce a rule of law to the effect that in those cases which depend upon knowledge of *the scientific effect of medicine, the results of surgery, or whether the attending physician exercised the ordinary care, skill and knowledge required of doctors* in the community in which he serves, must ordinarily be established by the testimony of physicians and surgeons. (emphasis added)

The law in Utah has been consistently so applied ever since. The problem with its application here, and the problem with Instructions 16a and 21a is that Appellant's case was not about the scientific effect of medicine, or the results of surgery. Nor did Appellant's case have anything to do with physicians. Rather, Appellant's case was concerned simply with what happens when *hospital staff* fails in its primary duty to alert physicians as to their patients' condition, so that diagnosis and treatment can be rendered. As such, it falls squarely into the realm of cases which a jury can

determine from their own common sense and experience. At the very least, the jury should have been allowed to consider the competent testimony from Appellant's experts on causation, expressly admitted by the trial court, and upon which the trial court's previous rulings had been based.

Instructions 16a and 21a told the jury they could not consider the testimony of Appellant's experts on causation, and thereby constituted prejudicial error. Appellant also asserts that the Instructions misstated the law. Respondent produced no authority to the contrary.

A. THE INSTRUCTIONS TAKEN AS A WHOLE DO NOT CURE THE PREJUDICIAL ERROR CAUSED BY THE FAILURE TO GIVE APPELLANT'S INSTRUCTIONS 24 AND 32, OR THE PREJUDICIAL ERROR IN GIVING INSTRUCTIONS 16a AND 21a.

Respondent claims, without explanation, that the errors in the Instructions and verdict form which are the subject of this appeal, were harmless. [LDS Brief, pp. 19-21] However, it is well-established that instructions which tend to confuse, mislead or incorrectly advise the jury on the law constitute prejudicial, reversible error. Mikkelsen v. Haslam, 764 P.2d 1384, 1387 (Ut. App. 1987). While it is true that this Court must consider the Instructions as a whole, the purpose of that inquiry is to determine whether the issues of fact and applicable law were presented to the jury in a clear and understandable way. Biggler v. Mapleton Irrigation Canal Co., 669 P.2d 434, 437 (Utah 1983).

That would, for example, require the Court to read the clear, concise and correct recitation of Appellant's burden of proof in Instruction 16 [R-510], and compare it to the convoluted and

confusing attempt to set forth the same burden in 16a. [R-511-12] It is confusing even now. Next, the Court should consider the jurors in their contemplation of Instruction 21a. This was the Instruction that Respondent's counsel read to the jury, referred to extensively, and emphasized was **the Instruction** on which the jury was to base its decision on proximate cause. [R-881-82] The simple fact is, that if the jurors followed Instruction 21a as Respondent's counsel exhorted them, they were required to answer question 3B negatively on the Special Verdict form. Instructions 16a and 21a effectively directed the verdict on the critical disputed issue of causation, and there was nothing any other Instruction or combination of Instructions could do to alter that fact.

In Watters v. Querry, 588 P.2d 702 (Utah 1978), our Supreme Court reversed a jury verdict because **one** instruction relating to causation was erroneous, even though the other instructions given correctly stated the law. The Court's reasoning is applicable here:

> The fact that other instructions were given inconsistent with the one in question and consistent with the law, cannot properly be regarded as curing the misconception the jury might have formed from the erroneous instruction complained of. The jurors would not know which instruction was correct and which one was in error, and thus would simply be in a position of not knowing which instruction to follow; and neither the parties nor the court would know which they did follow.

See also, Harris v. Utah Transit, *supra*, 671 P.2d 222-23, where an erroneous instruction on proximate cause was found to be reversible error even though other correct instructions were given which would have allowed the jury to reach a different verdict. All that is necessary for reversal is that there be a reasonable likelihood of a different verdict absent the error. *Id.*

Similarly, the failure to give Appellant's proposed Instructions 24 and 32, completely eliminated any opportunity for the jury to consider Appellant's "reduced chance of recovery - increased risk of injury" theory. No other Instruction or combination of Instructions in any way mitigates the prejudicial effect of that error.

IV. THE DISTRICT COURT ERRED IN FAILING TO GRANT APPELLANT A NEW TRIAL.

Based on the record, together with Appellant's Opening Brief and the foregoing Reply, it is obvious that the jury should have been allowed to consider Appellant's theory of the case, and that there was sufficient evidence from which the jury could have made a factual finding of causation in Appellant's favor without the assistance of expert testimony from a physician. Errors in the Jury Instructions prohibited the jury from doing their job, and deprived Appellant of having his theory of the case considered.

In Goff v. Doctors General Hospital, 333 P.2d 29 (Cal. App. 1958), the trial court granted plaintiffs Motion for a New Trial against the defendant hospital. There, Mrs. Goff experienced internal bleeding after childbirth. The nurses reported the patient's condition to her doctor for awhile, but stopped doing so as her condition deteriorated. The patient eventually went into shock and hemorrhaged to death without medical intervention. The hospital predictably contended that its negligence was not a proximate cause of the death. Plaintiffs, as here, presented common sense evidence that the hospital should have reported the patient's condition, with the end in view that prompt and adequate measures be

taken to safeguard Mrs. Goff's life. In its opinion granting the Motion for New Trial, the trial court in Goff stated:

> It is apparent from the evidence with particular reference to the time of 9:00 p.m., and 10:30 p.m, and 11:00 p.m., that both nurses in the exercise of ordinary care could have taken action that would have guarded the safety of Mrs. Goff *and that this nonfeasance contributed to the proximate cause of her death. Id.,* at 33 (emphasis added)

In upholding the Order for a New Trial, the Appellate Court held:

> Appellants also contend that if either of the appellate nurses was negligent the negligence was not a proximate cause of the death of Mrs. Goff. However, *the question of whether or not the negligence of the nurses was a proximate cause is one of fact*. Conceding that Dr. Ashley was negligent (as the physicians in this case were not), still if nurse Lee had called the doctor at 10:30 p.m., when she was aware the condition of the patient was critical, *who can say that the same result would have occurred.* The patient may have been in shock. The doctor may have been able to insert a needle for a blood transfusion. *The longer the delay, the more critical the condition of the patient became. Time was a most important factor.* In the instant case, a finding that the negligence of the nurse was a contributing cause of the death is supported by the record. *Id.* (emphasis added)

Indeed. Who can say what would have happened if the LDS Hospital staff had done its job in this case? Certainly not the experts called by the Hospital who were not there, and who did not perform any of the tests and procedures they would have done for their own patients, most of whom don't die, in similar circumstances. [Tr. (Lloyd) 409-10, (Trowbridge) 544-47, (Lahey) 606-15, 619-630, (Weinstein) 651-57, (Elliot) 770, 773-74] The causation issue in this case was a question of fact for the jury, based on all of the evidence, all of the circumstances, and the inferences that could be derived therefrom. The trial court errors on the Jury Instructions and Special Verdict form removed most of

Appellant's evidence from the jury's consideration, and with it, the opportunity to make appropriate factual conclusions regarding causation. If allowed to do their job, there was substantial unrefuted evidence from which the jury could have determined that the Hospital's negligence was a contributing cause of the death of Betty George. That the Hospital's negligence resulted in substantial injuries and damage to Mrs. George prior to her death was conclusively proved and not rebutted.

Justice demands that Appellant be awarded a New Trial.

CONCLUSION

THE ERRORS SET FORTH DEPRIVED APPELLANT OF A FAIR TRIAL AND THE OPPORTUNITY TO DEVELOP A PROPER RECORD.

1. Appellant had no opportunity to object to erroneous and prejudicial Jury Instructions prior to the time the jury was instructed. Appellant had no opportunity to object to the Special Verdict before it was provided to the jury for their deliberations.

2. On at least one occasion, on the record [Tr.328] and several more off the record, the trial court ruled consistently with Appellant's theory of the case that the medical cause of death (as opposed to whether the hospital staff's negligence contributed to the cause of Betty George's initial arrest) was irrelevant. In reliance on these rulings, Appellant refrained from calling Dr. Robert Flinner, the Pathologist who conducted the autopsy, who had previously been deposed on that subject. [R-758] After the close of evidence and just prior to closing arguments, the trial court told the jury that Appellant was required to prove the medical cause of death, knowing full well that Appellant, in reliance on the court's prior rulings, had never attempted to do so.

3. Early in Appellant's case in chief, on the record [Tr.323-331], and several times off the record, the trial court ruled that *only* someone, *in an official capacity* participated in determining the cause of death could testify on that subject. [The only person in that category was Dr. Robert Flinner, and possibly Dr. Kimball Lloyd.] The Court specifically stated:

> *The Court will, on the record, instruct counsel not to ask this witness, nor any other expert witness as to the decedent's cause of death, who did not participate in making that determination, so there is no misunderstanding on that part.* [Tr. 331]

Appellant obeyed the trial court's order. Specifically, Appellant refrained from questioning their own expert witnesses on the medical cause of death, and did not call their own physician experts who had been retained at great expense, and could have testified on that issue.[fn9] Thereafter however, the trial court allowed Respondent to call three witnesses who had nothing to do with the Mrs. George, to give their purely speculative opinions on cause of death. This testimony predictably became the focus of Respondent's defense. In addition, under Instructions 16a, 21a and the Special Verdict, Appellant was held to a burden of producing evidence on cause of death which the trial court had previously prohibited.

4. During trial, the district court properly qualified Appellant's nurse and respiratory therapist as experts, to testify as to whether the Hospital's negligence was a proximate cause of the injuries and damage complained of. [*See*, Addendum III to Appellant's

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[fn9] These experts were, J. Joshua Kopelman, M.D., an OB-GYN specialist from Aurora, Colorado; and Richard Sweet, M.D., also an OB-GYN, and infectious disease specialist from San Francisco.

Opening Brief.] After the close of evidence, and just before closing argument, the jury was instructed that Appellant had the burden to prove the medical cause of death through a physician, or lose. Instructions 16a and 21a required the jury to ignore the previously admitted testimony of Appellant's experts on causation.

5. The trial court refused to submit a Special Verdict which would have allowed the jury to independently consider whether the hospital's negligence was a proximate cause of damages suffered by Betty George prior to her death - a major component of Appellant's case.

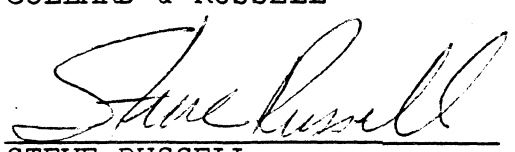
6. The trial court failed to grant a legally required directed verdict in favor of the defendant physicians, and refused to consult the record which would have established the error, when invited by counsel to do so. [Tr. 798-99]

7. Despite all of these unfair and extremely prejudicial last-minute events, the trial court refused to allow Appellant's counsel an opportunity to rebut Respondent's closing argument which, fearing no rebuttal, contained a number of false and prejudicial statements.

WHEREFORE, Appellant respectfully requests that the Judgment of the Third District Court be REVERSED, and the case be REMANDED for a NEW TRIAL, with the appeal costs awarded to the Appellant.

Dated this 14th day of December, 1989.

COLLARD & RUSSELL

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 1989, I had hand delivered four copies of Appellant's Reply Brief to each of the following:

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Addenda

SUPPLEMENTAL ADDENDUM

ELISE ZIEGENBUSCH, R.N. was working as charge nurse in the LDS Hospital ICU unit on the afternoon of August 2, 1986. She was called as a witness by respondent. Her testimony appears in the supplemental transcript [R-771] at pages 3-23.

Page 8:

> Q: [By Mr. Burbidge] What can you recall from those discussions [in the ICU with Dr. Lahey]?
>
> A: He felt like the angiogram, to determine whether she had had a pulmonary embolus, was negative. And he felt like the problems she had been having with her lungs were more of a problem that a lot of patients get after they have surgery. And that is that they don't breathe deep enough, whether it is because of pain or because of anesthesia. But they need to breathe more deeply, to expand their lungs. *And he felt this was her problem, that she just needed to do some respiratory exercises, which usually the nurse can help with, or else the respiratory therapist can help with the exercises. He felt like that if she was just able to breathe more deeply, that would . . . clear her lungs, and she wouldn't be having the problems she was having.* *
>
> Q: How did Mrs. George appear to you, as she was there in the ICU.
>
> A: She did not appear acutely ill . . .

* Note: Following her return to the 8th floor, Mrs. George received no respiratory exercises from the LDS Hospital nurses, nor was she seen at all by anyone from the respiratory therapy department until after her arrest.

Page 10:

> Q: Based on your background and experience . . . were you uncomfortable with the decision of Dr. Lahey, that this patient should not remain in the ICU?

A: From my point of view, she did not need to be in the ICU . . .

Page 15:

Q: [By Mr. Russell] [Y]ou know, don't you, that one of the most important functions of a nurse with a very sick patient, on a regular floor, is to report changes in the patient's condition, isn't it?

A: Yes.

Pages 16-17:

Q: You indicated it is an important function of the nurses to help doctors make decisions, didn't you?

A: Yes.

Q: Nurses are expected to tell doctors what they think, aren't they?

A: Yes, they are.

Q: Dr. Lahey, in the ICU, on the afternoon of August 2nd, thought that Betty was okay, didn't he?

A: Yes, he did.

Q: And so did you?

A: Yes.

Page 18-19:

Q: Dr. Lahey attributed the patient's respiratory problems to this condition that she had had previously, correct?

A: To problems that patients get from surgery, postoperatively.

Q: Atelectasis?

A: Yes.

Q: Dr. Lahey thought she needed to be seen by respiratory therapists, didn't he?

A: Yes. But for atelectasis, the nurses can handle deep breathing . . .

Q: You and Dr. Lahey both thought, when Mrs, George left, that she needed to have pulmonary assessments and exercises, didn't you?

A: Yes.

Q: Did you tell the nurses on Eight East that?

A: I can't be sure. I'm sure I must have, because *that was the problem. That's what we felt like the problem was.*

Q: Did the nurses on Eight East inform you they didn't know how to do a pulmonary assessment? [*See*, Tr. 75, 77, 134]

A: Nurses are trained to do that.

Q: They should have been able to do one, shouldn't they?

A: Yes.

Page 21:

Q: [By Mr. Burbidge] As a nurse, caring for a patient, who gives directions as to what care should be given to the patient?

A: The physicians write the orders, and then the nurses carry out the orders, *and if we feel like there is a problem, then we will talk to the physician and work out another plan, if we don't agree with what is going on or something like that.*

MARGENE WITHERS, R.N. was a former supervisor of Nurse Soraghan, who was acting as the "one-on-one special duty nurse" when Betty George arrested after not having been seen by a physician for over two hours. She was called as a witness by respondent. her testimony appears in the supplemental transcript [R-771], at pages 23-36.

Pages 31-32:

Q: [By Mr. Russell] When you take care of a patient one-to-one, you are supposed to carefully monitor the patient, aren't you?

A: . . . yes.

Q: You are supposed to watch carefully, and write down what you see about the patient, aren't you?

A: That's right.

Q: When you take care of a sick patient one-on-one, probably the most important function you have is to report changes in the patient's condition to the doctors, isn't it?

A: *We call physicians when changes occur. That's part of the nurse's job.*

Q: You call them whenever you think it might be necessary, don't you?

A: Right.

Q: It is the nurses duty to get help for a patient if the nurse thinks she needs it, isn't it?

A: Yes.

Q: That's what nurses are for, isn't it?

A: Yes.

Q: Particularly where you have a one-on-one, special duty nurse with instructions to carefully watch a patient, right?

A: Yes.